

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CANDY HANSEN

Claimant

VS.

WHOLE FOODS MARKET

Respondent

AND

ACE AMERICAN INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,026,667

ORDER

Respondent and its insurance carrier appealed the December 4, 2006, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

Claimant injured her right arm and shoulder on November 20, 2004, while lifting a box of containers from a cart. She later developed low back symptoms when she returned to work following right shoulder surgery. The parties agree claimant's November 20, 2004, accident arose out of and in the course of her employment with respondent.

This is the second appeal to the Board in this claim. The issue in the first appeal was whether claimant's depression and anxiety were directly related to the injuries she sustained working for respondent. Based upon then uncontradicted evidence, the undersigned Board Member determined they were. After that first appeal, Judge Hursh entered an Order dated September 6, 2006, which required respondent and its insurance carrier to designate a medical provider to treat claimant's depression and anxiety. Consequently, respondent and its insurance carrier authorized Dr. Patrick Hughes to treat claimant.

After evaluating claimant, Dr. Hughes concluded claimant needed treatment for her depression, but that depression was not related to her work-related injuries. Accordingly,

respondent and its insurance carrier requested a preliminary hearing to release them of their obligation to provide claimant psychological treatment.

Meanwhile, claimant's attorney had written respondent's attorney on September 11, 2006, in essence, objecting to Dr. Hughes and requesting psychological treatment from another provider. That letter followed claimant's attorney's letter of September 5, 2006, to Judge Hursh in which claimant requested the appointment of Dr. John Pro. Claimant's attorney then wrote the Division of Workers Compensation on September 18, 2006, requesting a preliminary hearing to address, among other things, whether claimant should be allowed to select her own psychiatrist or psychologist or, in the alternative, whether respondent and its insurance carrier should submit a list of three doctors from which claimant would select a treating doctor. And on October 25, 2006, claimant's attorney again wrote the Division of Workers Compensation requesting a preliminary hearing to address, among other issues, whether Dr. Pro should be authorized as claimant's treating physician or, in the alternative, whether she should be given the choice of three doctors. Other than the September 5, 2006, letter, respondent and its insurance carrier's attorney was not copied on the letters to the Division of Workers Compensation.

Following a preliminary hearing on December 4, 2006, Judge Hursh issued the December 4, 2006, Order in which he authorized Dr. Pro to treat claimant for her psychological condition.

Respondent and its insurance carrier contend Judge Hursh erred. They argue claimant did not send a seven-day letter seeking a change from Dr. Hughes at any time after Dr. Hughes examined claimant and claimant did not schedule a preliminary hearing for that purpose. Accordingly, they argue the Judge did not have jurisdiction to change the treating doctor as that issue was not properly before him. In the alternative, they argue that if the Judge did have the jurisdiction to change health care providers, the Judge should have allowed respondent and its insurance carrier to provide claimant with a list of three names from which she would choose a treating doctor. Consequently, respondent and its insurance carrier request the Board to set aside the December 4, 2006, Order or, in the alternative, to direct respondent and its insurance carrier to provide a list of three names from which claimant would choose her treating doctor.

Conversely, claimant requests the Board to affirm the December 4, 2006, Order. Claimant first argues that the issue of the seven-day notice of intent letter was not raised to the Judge and, therefore, should not be addressed for the first time on this appeal. Claimant next argues respondent and its insurance carrier selected Dr. Hughes to examine claimant to obtain a causation opinion rather than to provide her with appropriate treatment. Accordingly, claimant argues that respondent and its insurance carrier have failed to comply with the intent of the order requiring them to provide claimant treatment for her depression and anxiety.

The issues on this appeal are:

1. Does the Board have jurisdiction for the first time on appeal to review respondent and its insurance carrier's challenge of the sufficiency of claimant's notice of intent to request a preliminary hearing?
2. Should respondent and its insurance carrier be allowed to submit a list of three names from which claimant would select a doctor to treat her depression and anxiety?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

At the December 4, 2006, preliminary hearing, the parties advised the Judge that the issues being presented that day were (1) whether claimant's psychological treatment should be stopped and, if not, (2) whether claimant could have a different doctor, preferably Dr. Pro. At that hearing, the attorneys stated, in part:

Judge Hursh: Okay. And what are we taking up today?

Mr. Power: If I may, Judge, I believe that respondent and insurance carrier has filed a motion to terminate the psychological benefits presently being received by my client on the basis of the opinion of Dr. Hughes that her present psychological condition is not work related. I in turn have asked for a change of treating physicians and/or designation of Dr. Pro. Basically that's it.

Judge Hursh: Now --

Mr. Power: I think we had dueling applications for a Preliminary at the same time.

Mr. Morefield: That's correct.¹

Respondent and its insurance carrier did not raise the issue whether claimant's correspondence regarding another preliminary hearing had satisfied the requirements of K.S.A. 44-534a. In essence, respondent and its insurance carrier now challenge, for the first time on this appeal, whether claimant's letters were sufficient written notice of an intent

¹ P.H. Trans. (Dec. 4, 2006) at 3.

to file for a preliminary hearing and whether those letters sufficiently set forth the benefit change being sought.

The Workers Compensation Act limits the Board's jurisdiction to those issues first presented to the administrative law judges.

The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.²

Because respondent and its insurance carrier did not challenge the propriety of the December 4, 2006, preliminary hearing to the Judge, that issue cannot be addressed for the first time on appeal. The rationale is that the parties should have an opportunity to present evidence on the issues raised, which they cannot do before the Board. To hold otherwise would place the Board in the position of attempting to decide an issue based upon an incomplete record and deny the parties the opportunity to present evidence.³

Moreover, the Board continues to hold that the Division of Workers Compensation retains jurisdiction over the parties and the issues presented at earlier preliminary hearings. Accordingly, later hearings conducted to address those same preliminary hearing issues are treated as a continuance of the earlier hearing. That interpretation of the Workers Compensation Act affords the parties expeditious hearings and avoids cumbersome procedures that would only serve to delay prompt decisions.

In the December 4, 2006, Order, Judge Hursh appointed Dr. Pro to treat claimant for her depression and anxiety. Respondent and its insurance carrier contend the Judge exceeded his jurisdiction and authority by failing to permit them to submit to claimant a list of three doctors' names from which claimant would select a treating doctor.

There was no testimony given at the December 2006 hearing. Respondent and its insurance carrier, however, told the Judge that Dr. Hughes was continuing to treat claimant. Claimant, on the other hand, argued that Dr. Hughes was merely selected by respondent and its insurance carrier to evaluate claimant and render a causation opinion regarding claimant's psychological problems. In short, claimant argues "the selection of Dr. Hughes was clearly an illusion"⁴

² K.S.A. 2006 Supp. 44-555c(a).

³ See *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

⁴ Claimant's Brief at 4 (filed Jan. 31, 2007).

The Board has ruled in the past and continues to hold that whether the administrative law judge must, in a given set of circumstances, authorize treatment from a list of three physicians designated by respondent is not a jurisdictional issue subject to review on an appeal from a preliminary hearing Order.⁵ Jurisdiction is described in *Allen*⁶ as follows:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

The workers compensation administrative court has limited jurisdiction. Its subject matter jurisdiction is limited to cases involving accidental injuries arising out of and in the course of employment. Whether claimant suffered accidental injury and whether the injury arose out of and in the course of employment are, therefore, designated in K.S.A. 44-534a as jurisdictional issues. Personal jurisdiction requires notice and timely written claim. Notice and written claim are also designated as jurisdictional issues under K.S.A. 44-534a. Whether the administrative law judge must, in a given set of circumstances, authorize treatment from a list of three physicians designated by respondent is not a question which goes to the jurisdiction of the judge. The judge has the jurisdiction to decide this question.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, this appeal is dismissed.

IT IS SO ORDERED.

⁵ See *Briceno v. Wichita Inn West*, No. 211,226, 1997 WL 107613 (Kan. WCAB Feb. 27, 1997) and *Graham v. Rubbermaid Specialty Products*, No. 219,395, 1997 WL 377947 (Kan. WCAB June 10, 1997).

⁶ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁷ K.S.A. 44-534a.

Dated this ____ day of March, 2007.

BOARD MEMBER

c: Timothy E. Power, Attorney for Claimant
Richard W. Morefield, Jr., Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge